Supreme Court, U. S.
FILED
SEP 12 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1977

No. 76-1756

EMMETT E. NORTON and FRANCES G. NORTON,

Petitioners,

v.

THE UNITED STATES,

Respondent.

REPLY TO BRIEF FILED BY UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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In accordance with Rule 24(4) of the Rules of this Court, petitioners respectfully submit the following brief comments addressed to arguments first raised in the Brief for the United States Filed In Opposition.

(a) Unfortunately, the government has not addressed itself to the questions presented here for review, namely:

> "1. Whether the principles enunciated by this Court in the *Corn Products* case should have been applied by the Court of Claims to a single sale in the final liquidation of the taxpayer's business.
>
> "2. Whether the *Corn Products* principle should be applied to the sale of an asset described in Section 1231 of the Internal Revenue Code."

Petitioners had hoped that the government would join them in asking this Court to review these important questions of federal income tax law which have not, but should be, settled by this Court. Instead, the government's brief ignores these issues and suggests new minor issues which are of doubtful merit. The injection of these minor issues only obscures the real issues.

(b) Unlike the position taken by the government in the Court of Claims, the government now contends that the timber sale contract and the timber itself were "excluded from capital gains treatment by the statutory exceptions in Sections 1221(1) and 1231(b)(1) of the Internal Revenue Code for 'property of a kind which would be includable in . . . inventory'". (Page 6 of government brief)

The entire government brief is based upon the erroneous concept that the timber was includable in petitioners' inventory. However, the government itself points out, on pages 3 and 9 of its brief, that the Forest Service would continue to hold "all right, title, and interest" in the timber covered by the contract until the timber was "cut, scaled and

paid for," at which time title would pass to petitioner.

Income Tax Regulation 1.471-1, dealing with inventories, specifically states that "Merchandise should be included in the inventory only if title thereto is vested in the taxpayer." Timber which is the subject of a government timber sale contract would not be includable in the inventory of one having a contract right to cut such timber.

No one would seriously contend that petitioners were holding the timber sale contract or the timber itself for sale to customers in the ordinary course of their business. They were selling logs, not timber.

(c) Contrary to the statements made on pages 8 and 9 of the government's brief, the briefs filed by the government in the Court of Claims

clearly show that the government contended and agreed that the timber was a Section 1231 asset. The only disagreement between the parties was whether or not the *Corn Products* principle was applicable. This is the very issue that this Court is being asked to resolve.

Respectfully submitted,

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